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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

LINDA E. SANGSTER,

PETITIONER,

v.

UNITED AIR LINES, INC., A DELAWARE CORPORATION, AND AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION,

RESPONDENTS.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 6, 1981

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APPENDIX A

[Filed December 8, 1980
Richard H. Deane
Clerk, U.S. Court of Appeals]

NO. 78-1242, 78-1289
D.C. No. CV 76-2426 SC

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LINDA E. SANGSTER, an individual,

Plaintiff-Appellant,

v.

UNITED AIR LINES, INC., A DELAWARE CORPORATION, AND AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION,

Defendants-Appellees.

OPINION

Appeal from the United States District Court for the Northern District of California
Samuel Conti, District Judge, Presiding
Argued and Submitted August 13, 1980

Before: WRIGHT, GOODWIN and ALARCON, Circuit Judges.
ALARCON, Circuit Judge:

This is an employment discrimination case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. Linda E. Sangster, a former airline stewardess, alleged that her employer, United Air Lines, Inc. (United), and her collective bargaining agent, the Air Line Pilots Association (ALPA) had discriminated against her on the basis of her sex. ALPA appeals on No. 78-1242 from the district court order granting Sangster's motion for pretrial summary judgment on the issue of liability and ordering her reinstatement with full senority.[1] Sangster appeals in No. 78-1289 from the subsequent judgment denying her an award of back pay and awarding attorneys' fees. We affirm the district court in all respects.

FACTS

Sangster was hired by United on November 24, 1961 as an airline stewardess or flight attendant. She was unmarried at that time. On May 28, 1966 she was promoted to the nonflight position of stewardess supervisor. This change in status did not affect her seniority as a stewardess, which continued to accrue in accordance with the provisions of the applicable collective bargaining agreement as though she were still in active stewardess service. The transfer did not preclude a later return to her position as stewardess with full accrued seniority.

On April 9, 1968 Sangster married a United pilot. She was aware that once married United's rules would bar her from resuming her former stewardess

position and that she would forfeit her stewardess seniority rights. Nevertheless, she decided to continue in her employment as a stewardess supervisor after her marriage and to await the outcome of negotiations between United and ALPA, which she hoped would soon terminate the no-marriage policy.

United and ALPA did reach such an agreement on November 7, 1968. The agreement was only partially retroactive, however, and did not protect married stewardess supervisors who wished to transfer back to a flight position. When Sangster applied for transfer to stewardess status on November 8, 1968, United denied her application. The next day she filed a formal complaint under United's internal grievance procedure, and on February 6, 1969, she filed a

charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Her grievance complaint was denied by United on June 4, 1969. On June 16th Sangster quit her employment with United.

On March 8, 1972 the EEOC found reasonable cause to believe that Sangster's charge of discrimination was well-founded. On October 12, 1976 the EEOC informed her that the dispute could right to sue. On November 1, 1976 Sangster filed her complaint in district court seeking reinstatement with full seniority, back pay and attorneys' fees.

The court granted Sangster's motion for pretrial summary judgment on the issue of liability and ordered Sangster reinstated with full seniority.

A trial was held on the issues of back pay and attorneys' fees. At the trial, Sangster testified as to her efforts to seek alternative employment. She had remained unemployed for the eight years between the day she voluntarily quit her job and the time United was ordered to restore her to her position as stewardess with full seniority. She admitted that she did not seek work with another airline after leaving United, either as a stewardess or in a supervisory or other capacity. Her efforts at obtaining other positions were minimal.[2/] Sangster testified that the stewardess position at United with her seniority intact was a unique position, enabling her to adapt her schedule to her pilot-husband's while being assigned to the same geographic area.

The district court found that Sangster was not interested in any other position during her eight-year period of unemployment and that she had not exercised reasonable diligence in obtaining substantially equivalent employment. Concluding that she had not met her obligation to mitigate her damages, and therefore was not entitled to compensation for the period of her unemployment, the court denied Sangster's request for back pay. The court awarded attorneys' fees against the defendants of $5,537.00, an amount substantially below the requested sum.

ALPA's APPEAL

ALPA contends that Sangster failed to file her charge of employment discrimination with the EEOC in a timely fashion. We find no merit in ALPA's

contention that the 90-day filing period commenced on the date of Sangster's marriage. In light of the remedial policies behind Title VII, we refuse to give the strained interpretation urged by ALPA as to when Sangster's right of action accrued and thus to deny her redress. See Mahroom v. Hook, 563 F.2d 1369, 1375 (9th Cir. 1977), cert denied, 436 U.S. 904 (1978). It was not until Sangster attempted to transfer to a stewardess position on November 8, 1968 and felt the impact of the discriminatory transfer rule that the filing time began to run. Therefore, Sangster's charge filed on February 6, 1969 was timely filed.[3/]

SANGSTER'S APPEAL

A. Back Pay

An award of back pay in employment discrimination cases is one of the weapons in a court's arsenal to effectuate the dual purposes of Title VII. (1) to end discriminatory employment practices; and (2) to make employees whole for injuries suffered on account of unlawful employment discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). A finding of unlawful discrimination requires an award of back pay unless reasons exist "which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Kaplan v. International Alliance

of Theatrical Stage Employees, 525 F.2d 1354, 1363 (9th Cir. 1975) (quoting Albemarle 422 U.S. at 421). Title VII's remedial provisions are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible, requiring that persons aggrieved by discriminatory employment practices "be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976). The discretionary decision of the trial court regarding an award of back pay is reversible only for an abuse of the court's discretion. Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978).

As a broad proposition, injured parties are expected to mitigate the damage they suffer. This notion is expressed in Title VII in the following language: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. Section 2000e-5(g) (emphasis added).

"The backpay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act." Albemarle Paper Co., 422 U.S. at 419. Under the NLRA, courts have long held that back pay is not to be awarded when the evidence shows a willful loss of earnings. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941). Developed from this general

concept, the more specific acts which constitute such willful conduct are: failure to remain in the labor market, refusal to accept substantially equivalent employment, failure diligently to search for alternative work, or voluntarily quitting alternative employment without good reason. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2nd Cir. 1965), cert. denied, 384 U.S. 972 (1966).

United and ALPA had the burden of showing that Sangster could have mitigated her damages. Kaplan v. International Alliance of Theatrical Stage Employees, 525 F.2d at 1363. Sangster claims that United and ALPA failed to establish that there was substantially equivalent work available which, in the exercise of reasonable

diligence, she could have obtained. See Sias v. City Demonstration Agency, 588 F.2d at 696. We disagree. Moreover, she admitted that she knew of an in-flight supervisory position that had been available since 1970 for at least the last few years of her unemployment and that other United employees on similar circumstances had obtained jobs as stewardesses. Perhaps most important is Sangster's admission that she never even attempted to procure a job as a stewardess, the work she considered preferable to her position as stewardess supervisor. The evidence, from whatever sources, was more than sufficient to satisfy appellees' burden of showing that substantially equivalent work was available to Sangster.

Sangster's reliance on cases that hold that a plaintiff is not required to seek employment that is outside her area of residence, distasteful, essentially different, or inferior is misplaced. Apparently, her main reason for preferring the stewardess position to that of stewardess supervisor was that she could tailor her schedule to that of her pilot-husband. Certainly United was unjustified in denying her that opportunity solely on the basis of her sex and marital status. Nonetheless, Sangster was not entitled to remain idle for eight years after quitting substantially equivalent employment even if her right to seek employment with a different employer is given full recognition. We conclude that Sangster did not meet her duty to mitigate her

damages, and that denial of back pay under the circumstances would not frustrate Title VII's remedial purposes. See DeLorean Cadillac, Inc. v. NLRB, 614 F.2d 554, 555 (6th Cir. 1980) (finding of reasonable diligence unsupported by record as a whole where based on uncorroborated testimony by discriminatee of his efforts to secure a job). Cf. Inda v. United Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977), cert.denied, 435 U.S. 1007 (1978) (reasonable diligence on the part of two stewardesses, each unemployed for less than nine months, shown by credible testimony); Sprogis v. United Air Lines, Inc., 517 F. 2d 387 (7th Cir. 1975) (reasonable diligence after discriminatory discharge shown on the part of married stewardess by at least one formal application for

employment and the procurement of a temporary two-month job during a two-year period of unemployment).

B. Attorneys' Fees

An award of attorneys' fees in a Title VII suit is within the broad discretion of the trial court and should be proportionate to the extent to which the plaintiff prevails in the suit. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1008 (9th Cir. 1972). The trial judge is in the best position to evaluate the complexity of the case as well as other relevant factors. We affirm the award of attorneys' fees in the amount set by the trial court, finding no abuse of discretion.

AFFIRMED.

FOOTNOTES

1/ The district court issued a written opinion reproted at Sangster v. United Air Lines, Inc., 438 F. Supp 1221 (N.D. Cal. 1977).

2/ As summarized by the court, the evidence showed:

> The plaintiff has testified that, with reference to the mitigation of damages in this case, which is the central and crucial issue, the plaintiff has testified that she reviewed classified ads for suitable jobs. However, there is no evidence that she made any calls with reference to her perusal of the classified ad section and we are talking of a period of almost 8 years from July 1969 to May 1977. Also that she applied as a cocktail waitress or restaurant hostess; the great majority of those, about 4 applications, made after she consulted her lawyer in December 1975, and only 2 before that time.
>
> She inquired by telephone only of 4 travel agencies regarding employment. She did not apply to other airlines and she did not register at any employment agency for work or with the state nor did she apply for benefits, all of this during the said 8-year period. (RT: 127-28)

The record bears out this summary. See RT: 54-67, 124.

3/ ALPA also contends that Sangster's claim was barred by the applicable state statute of limitations. This argument must fail. See Kirk v. Rockwell Int'l Corp., 578 F.2d 814, 819 (9th Cir. 1978). We also find no grounds for applying the equitable doctrine of laches to bar Sangster's claim. The considerable delay in filing her claim in district court was not an inexcusable lack of diligence in light of the facts that the EEOC did not inform Sangster of her right to sue and that she did not learn until some time in 1975 that she could sue without awaiting a final resolution by the EEOC. Cooper v. Bell, No. 78-2265, slip op. at 4845 (9th Cir. Aug. 21, 1980).

APPENDIX B

[Filed October 14, 1977
William L. Whittaker, Clerk]

No. C-76-2426 SC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LINDA E. SANGSTER,	)
	)
PETITIONER,	)
	)
v.	)
	)
UNITED AIR LINES, INC., A DELAWARE CORPORATION, AND AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION,	)
	)
RESPONDENTS.	)

OPINION

Linda Sangster sues United Air Lines, Inc. (United), and the Air Lines Pilots Association, Internatinal (ALPA), a labor organization representing stewardesses, among others, charging both with unlawful sex discrimination in

employment. 42 U.S.C. § 2000e-5. She seeks reinstatement to the position of stewardess with full seniority and benefits, back pay with interest, attorney fees and costs. The matter comes before the court on plaintiff's motion for partial summary judgment on the issues of liability and reinstatement with full seniority, and on ALPA's motion for a summary judgment, or, in the alternative, to dismiss the complaint for lack of jurisdiction or failure to state a claim. United does not oppose plaintiff Sangster's motion except as to liability for monetary damages. All parties agree as to the material facts, though they sometimes differ as to the construction which should be placed on them.

FACTS

Plaintiff Sangster, then an unmarried woman, was employed by United Air Lines, Inc., as a stewardess or cabin attendant on November 24, 1961. On May 28, 1966, then still unmarried and thus eligible for continued flight duty, she accepted promotion to the non-flight position of stewardess supervisor. This change of status did not affect her seniority as a stewardess which continued to accrue in accordance with the provisions of the applicable collective bargaining agreement as though she were still on active stewardess service. Nor did it preclude a later return to stewardess status with full accrued seniority should she so choose.

On April 9, 1968, plaintiff Sangster married. She was aware that if she did so United's rules would bar her from resuming her former stewardess position, and that she would forfeit her stewardess seniority rights.[1/] Nevertheless, though her sole employment interest by then was to return to stewardess status, she decided to marry, to continue as a stewardess supervisor for the time being, and to await the outcome of negotiations between United and ALPA which she had reason to believe would soon terminate the "no-marriage" policy.

United and ALPA did reach such an agreement on November 7, 1968, and on November 8, 1968, Mrs. Sangster applied for transfer to stewardess status. But the agreement was only partially retroactive and it did not protect married

stewardess supervisors in her circumstances. Following an announcement to that effect by ALPA and denial of her application by United, she instituted a complaint on November 9, 1968, according to company grievance procedure. After ALPA twice refused United's suggestion that the agreement be further extended to include married stewardess supervisors, she filed a charge of unlawful employment practices with the Equal Employment Opportunity Commission on February 6, 1969, at the suggestion of a United officer.

Plaintiff Sangster continued to work as a stewardess supervisor while her company grievance was pending, but quit United's employ on or about July 16, 1969, following its denial of her complaint on June 4, 1969. Mrs.

Sangster's husband was and is a pilot for United; she desired to coordinate her schedule with his, an eventuality possible only by resuming flight status and conforming her work schedule to his (an outcome possible because of seniority preferences), or by quitting any conflicting job. Refused permission to fly, she quit her conflicting stewardess supervisor position.[2/]

At no time, however, did Mrs. Sangster ever discontinue her efforts to obtain redress through the EEOC. But burdened by its enormous backlog and by the complications caused by a spate of related cases,[3/] the EEOC did not find until March 8, 1972, that there was reasonable cause to believe that her charge was true, informing her then that it would begin conciliation efforts on her

behalf "as soon as possible," and advising her that she would be kept informed of progress. Nothing more transpired until October 12, 1976, when the EEOC, after some prodding from Mrs. Sangster, notified her that it had been unable to reconcile her dispute, and that she had a right to sue. This action was filed nineteen days later on November 1, 1976.

It would appear that something should have been done during this extended period, but the fault can be laid on no one party or organization. Mrs. Sangster could after six months have removed her claim from the EEOC and come into federal court for the relief she was seeking. However, she only inadvertently learned of this option sometime in 1976, and she was under no legal obligation to bypass the EEOC in any

case. Similarly, she could have pressed the EEOC for speedier action. But she is no more to blame for failing to do so than are United and ALPA, which also had means to force the issue and which, it may be assumed, had even greater interest in its outcome, being subject to a number of such charges. Again, the EEOC could have acted with greater dispatch, or, if unable to do so, could have informed all concerned of its incapacity and of the availability of other legal avenues. But to have done this it must in some sense have abdicated responsibility placed on its by Congress, which reiterated in 1972 its preference for resolution of these conflicts through the EEOC though fully aware of the EEOC's acute overload.[4/]

No policy or rule restricting employment as stewards to single males has ever been enforced by United. Its practice and policy of refusing to employ married persons as cabin attendants was applied soley to married women, as opposed to married men. United, as previously stated, did discontinue this policy on November 7, 1968, with respect to married women generally, but it continued to bar married stewardess supervisors from transfer to stewardess positions though all other stewardess supervisors were permitted to do so. As no parallel restriction was imposed on similarly situated male employees, the change of policy simply narrowed the sweep of United's prior sexually discriminatory policy; that policy continued in effect with respect to married

female stewardess supervisors who sought flight positions as cabin attendants.[5/] To the extent that United's policy pertained only to job classifications as to which there may have been no male counterpart, its marriage ban was not a bona fide occupational qualification.

The Air Line Pilots Association, International, shared in the maintenance of this practice and policy insofar as it affected Mrs. Sangster. Although its pressure and initiatives were responsible for the abandonment of the policy with respect to stewardesses (who were members of the union), it resisted for a time United's attempts to extend the same nondiscriminatory treatment to already married steward supervisors (who were members of

the management), notwithstanding contractual seniority rights afforded stewardess supervisors who were unmarried. As United's denial of Mrs. Sangster's application for transfer to stewardess status hinged on ALPA's opposition, its insistence on continuance of the discriminatory practice with respect to married stewardess supervisors renders it equally a cause of that denial, and an equal partner with United in the perpetuation of the discriminatory practice.[6/]

The court finds that United and ALPA engaged in an unlawful discriminatory employment practice by refusing or preventing employment as stewardesses to married stewardess supervisors, in that this distinction discriminated on the basis of sex without any bona fide

ground for such classification. The court futher finds that United and ALPA concurred in the application of this unlawful discriminatory practice to Linda Sangster on November 8, 1968, when United denied Mrs. Sangster's application for transfer to stewardess status.

LAW

ALPA moves for summary judgment and opposes Mrs. Sangster's motion for partial summary judgment, contending that her claim under Title VII is barred because she did not file her charge with the EEOC within the filing period then in effect. In the alternative, it moves to dismiss on the ground that the action was not filed in this court within the applicable California statute of limitations, or that she was guilty of laches.

A. Timeliness of EEOC Filing.

The court has already twice rejected ALPA's contention that Mrs. Sangster's EEOC filing was untimely. But ALPA again renews its assertion, claiming as justification that the court did not then have the guidance of the Supreme Court in its decision in United Air Lines, Inc v. Evans, supra, a case arising out of the same discriminatory policy. It asserts once more that the critical date triggering the filing period was April 9, 1968, the date of plaintiff's marriage, and not November 8, 1968, the date plaintiff's application for transfer to stewardess status in fact was denied. Lest there be doubt as to the basis of the court's ruling to the contrary, the court will consider the issue anew.

Although Evans had not been decided when the court issued its first order, the decision was consdidered by this court prior to its reconsideration of its order on June 28, 1977. The court reaffirmed that order because, among other reasons, Evans is not on point. Nor are the other cases now cited to the court by ALPA.

In Evans, the Supreme Court ruled that a complaint filed with the EEOC five years after the person aggrieved was discharged by United Air Lines, and one year after she was rehired by United, though with no seniority, could not be regarded as having been brought within 90 days of a triggering discriminatory act. Neither the fact that she was treated less favorably than males hired after her termination

in 1968 and prior to her re-employment in 1972, and thus with less total service, nor the fact that the seniority system gave present effect to that past discriminatory practice, was adequate to constitute a present, continuing violation sufficient to render her EEOC filing timely.

This case is plainly distinguishable. Not only does it not raise a question of "continuing" violation, but, as the court has twice ruled, the actionable injury to Mrs. Sangster occurred when United denied her application for transfer. The court does not accept ALPA's contention that the denial of plaintiff's application for transfer was already a "fait accompli" on April 9, 1968, or that rejection of her application constituted no more than

"crystallization" of an act of discrimination which automatically took place when plaintiff married. Although Mrs. Sangster was aware of United's policy when she married on April 9, 1968, and that her marriage would subject her to loss of stewardess seniority and eligibility for transfer to stewardess status, it did not in fact have that effect on her until she applied for transfer and was denied. ALPA's disingenuous sophistry cannot overcome the facts.

As the court previously ruled, it is the doing of an actual act of unlawful discrimination against a specific aggrieved person which makes it an unlawful employment practice proscribed by Title VII. Only when the deed is done can that aggrieved person be said to possess a cause of action, and thus only

by its doing can the filing period be triggered. The prospect of its doing or the existence of a policy committing the doer to the doing is not sufficient, no matter how imminent or certain application of the policy to the aggrieved person may be. Unlawful employment practices, the court again states, do not float free in the air; they exist only when attached to a particular person. A discriminatory policy does not become an unlawful discriminatory practice until a specific person has felt the sting of that policy. Indeed, unless a complaining party can show enforcement of the policy against him or her sufficient to provide standing, no suit thereon could be entertained.

Here, although plaintiff knew that she was considered by United to

have forfeited her seniority and transfer rights on the day she married, United did not enforce its policy against her until November 8, 1968. Her cause of action accrued as of that date, and on that date the 90-day filing period began. Her filing with the EEOC, therefore, was timely.

B. Timeliness Under California Statutes of Limitation.

ALPA next contends that plaintiff's action, filed in this court on November 1, 1976, is barred by either of two analogous state statutes of limitations. ALPA argues that either the one-year tort liability statute, Cal. Civ. Proc. Code § 340(3), or the three-year statutory liability statute, id., § 338(1), will bar the action since it was filed more than eight years after the cause of action accrued. See, e.g.,

Kirk v. Rockwell International Corp., 14 E.P.D. (CCH) § 7 646 (C.D. Cal. 1977); Clayton v. McDonnel Douglas Corp., 13 F.E.P. Cas. (BNA) 451 (C.D. Cal. 1976), appeal dism'd on other grounds (9th Cir. 1977).

This contention was foreclosed by the Court of Appeals for the Ninth Circuit in Cunningham v. Litton Industies, 413 F.2d 887, 890-91 (9th Cir. 1969):

> We hold that the ... period within which suit may be filed in federal district court begins to run when the aggrieved party received notice of failure to effect voluntary compliance from EEOC, regardless of the time the Commission has taken to process the charge.

...

> The statutory scheme of Sec. 706 [section 2000e-5] is thus fulfilled by allowing conciliation attempts to continue as long as they may appear fruitful, while at the same time giving either the aggrieved party or the respondent the right to precipitate the EEOC action of notification, which triggers the "statutory" period for filing suit ...

See Cleveland v. Douglass Aircraft Co., 509 F.2d 1028 (9th Cir. 1975); Jefferson v. Peerless Pumps Hydronamic, 4567 F.2d 1359 (9th Cir. 1972).

There is nothing in Occidental Life Insurance Company of California v.

EEOC supra, which would render this rule less binding on the court. Insofar as the opinion has any applicability to this private action, Occidental Life disapproves mechanical importation of state statutes of limitations. It is important, the Court said, that resort to such statutes

> not frustrate or interfere with the implementation of national policies ... State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of [Title VII].

53 L.Ed.2d at 412.

As that national policy requires "employment discrimination claims ... [to] be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in federal court," id. at 412-13, it would hardly be appropriate to rely on a state

statute of limitations here where plaintiff, perhaps to her present disadvantage, relied on EEOC efforts for eight years. Nothing in the Act explicitly requires the EEOC to conclude its conciliation efforts within any maximum period of time, nor should state statutory limits be permitted to compel an aggrieved person to abandon this preferred procedure in favor of a private enforcement action. See id. at 407, 411-414.

Mrs. Sangster was notified by the EEOC on October 12, 1976, that conciliation efforts had failed. She filed civil suit in this court on November 1, 1976, well within any applicable federal period of limitations. In view of the Ninth Circuit's holding in Cunningham, this court cannot hold that any

California statute of limitations bars the action. This contention, therefore, is rejected.

C. Laches.

ALPA finally contends that the action should be barred under the doctrine of laches. Cf. e.g., Fowler v. Blue Bell, Inc., 14 F.E.P. Cas. 1009, 1012 (N.D. Cal. 1976). ALPA claims prejudice to its members by reason of any reinstatement with seniority which might be ordered, and claims that Mrs. Sangster's failure to seek an earlier ruling from the EEOC that conciliation had failed was inexcusable lack of diligence.

Mrs. Sangster's reliance on the EEOC to conciliate her dispute with United cannot be characterized as lack of diligence on her part in view of the

strong federal policy favoring such reliance. She cannot be found chargeable with neglect which would bar her right to bring this action when, trusting in the good offices and promise of her government to seek resolution of her complaint, she commits that grievance to its care.

Nor would it be just to penalize Mrs. Sangster for delays, as much attributable to ALPA, United and the EEOC as to her. Though without making a pest of herself she might have done more, so might have all concerned, and to visit the entire burden of the fault on Mrs. Sangster alone would be unfair. EEOC's conciliation efforts, "regardless of the time taken," are designed to aid in effectuation of remedy. The court will not find that its

procedure has in this instance prevented it. Franks v. Bowman Transportation Co., 424 U.S. 747, 778 (1976); Cunningham v. Litton Industries, supra.

Accordingly, the court grants partial summary judgment to Mrs. Sangster to the extent specified below, and denies all motions brought by ALPA.

Remedy

In considering the extent to which Mrs. Sangster is entitled to a remedy, the court is confronted with the problem of the proper weight to be attached to plaintiff's voluntary quitting of her job as a stewardess supervisor, and her failure to press the EEOC for speedy action on her complaint.

Clearly, it is the court's duty to render a decree which will so far as possible eliminate all the

effects of the discrimination against her, responsibility for which is shared by United and ALPA. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975). But the court's obligation is to give compensation equal to the injury caused by these parties, no more and no less. Thus, the court questions whether a remedy which includes compensation in various possible forms for the period she voluntarily was not an employee of United is needed to make her "whole".

In answering, it is necessary to distinguish between United's refusal to give Mrs. Sangster the job she wanted and sought, that of stewardess, and the job she did not want and quit, that of stewardess supervisor. It seems obvious that United cannot insulate itself from nor set up a defense to a claim of

unlawful refusal to hire as to one job, by offering an applicant therefor a second job which she does not want and which differs in material aspects. See Franks v. Bowman Transportation Co., supra at 768-69. Such an offer may have relevance to issues of damages or mitigation, but it will not overcome the unlawfulness of its refusal to hire.

On the other hand, where an applicant is found to have given up his or her effort to secure the position from which he or she was unlawfully barred, the employer will not be held to have caused injuries flowing from that unlawful act; accordingly, the applicant will obtain no remedy. Gerstle v. Continental Airlines, Inc., supra; cf. United Airlines v. Evans, supra.

Mrs. Sangster, therefore, must show by a preponderance of the evidence that her voluntary departure from her supervisory job did not amount to a voluntary abandonment of her claim to the stewardess position. She also must show that any injury for which she seeks compensation was a product of United and ALPA's unlawful discrimination, and not of her own voluntary actions.

The court finds that she has met the first of these burdens. The stewardess position differed materially from the supervisory position she occupied. Thus, she was not obligated to accept or retain that position in lieu of the position she was unlawfully denied. In fact, her decision to quit the supervisory job was provoked by one of the most material differences between

that post and the stewardess position, namely the incompatibility of her supervisory work schedule with that of her husband. As at no time did she cease to seek employment by United as a stewardess, her quitting the supervisory position did not constitute abandonment of her efforts to obtain her lawful due.

But as to the second of her burdens, Mrs. Sangster has made a less convincing showing. The court, of course, takes as a starting point a presumption in favor of rightful seniority relief, relief which may not be denied except on the basis of unusual facts and circumstances that would not generally be found in Title VII cases, or for reasons which "'if applied generally, would ... frustrate the central statutory purposes of eradicating discrimination

throughout the economy and making persons whole for injuries suffered through past discrimination.'" Franks v. Bowman Transportation Co., supra at 771, 779 n. 41. Ordinarily, having shown the unlawfulness of United's refusal to permit her transfer, Mrs. Sangster would be entitled to be slotted in that position in the seniority system that would have been hers had she been permitted to transfer at the time of her application on November 8, 1968. Id. at 765-66.

However, an award of retroactive seniority is not requisite in all cases, but is subject to the court's sound equitable discretion. Id. at 770-71. Equitable remedies, as the Supreme Court pointed out, must be a "'special blend of what is necessary, what is fair, and what is workable ...'"; the

court must "'eschew rigid absolutes and look to the practical realities and necessities inescapably involved ....'" Id. at 777 n. 39.

First of these practical realities is the fact that Mrs. Sangster quit United. Although in no sense can her right to recovery for denial of the stewardess position on November 8, 1968, be held contingent upon later retention of the supervisory job, it remains true that her right to the stewardess job and to full seniority contratually sprang from her possession of the supervisory positon. When she gve up that post, therefore, she considerably weakened the strength and urgency of her claim by adding a second obstacle to the fact of her marriage. That this contributed to the extent of her injury seems clear,

since otherwise she would have been reinstated as a stewardess on October 16, 1969, when United and ALPA concluded an agreement which would have applied to her. Further, it indicated that she may have thereby intended to abandon her claim, an impression which, so far as the evidence shows, she did nothing to dispel. One may reasonably infer that this also contributed to the EEOC's slow handling of her charge, since it may well have believed her claim to have been dropped.

Secondly, Mrs. Sangster did not pursue her remedy with much vigor. She may have had a right to rely on the slow processes of the EEOC, a right which absolves her of any charge of neglect which would bar her claim from this court, but she was not entitled to

sleep on that right. Even the best of procedures can sometimes go wrong, and it behooves a person who claims to be actively pressing for remedy of a grievance to periodically reassert that fact when nothing is heard from the accountable agency for lengthy periods, and to urge it to faster action. Mrs. Sangster's complacency in the face of an extraordinary passage of time is at least partly responsible for its duration.

But to take either of these facts as sufficient cause to reduce her remedy would be to state a rule which, "'if applied generally, would ... frustrate the central statutory purposes of eradicating discrimination through the economy and making persons whole for injuries suffered through past

discrimination.'" Id. at 771, 779 n. 41.

If relief is to be limited in any significant measure in all instances where an employee quits one job after unlawfully being denied another job by the same employer, then the employee would be constrained eiher to contribute by his labor to an employer who has treated him unfairly and who persists in that unfair treatment, or to take less than a whole remedy for injuries suffered. Again, to reduce a remedy unless the employee consents to serve his employer during the eleven years it may take, as here, to obtain that remedy, would force impossibly onerous choices on the employee and, because the employee's readiness to bring charges would be inhibited, the Act's purpose of ending

economic discrimination would be frustrated.

Similarly, if a portion of the relief otherwise due is to be denied because the person aggrieved fails to seek his remedy with adequate industry, where the legally offending parties are equally culpable for that delay, and where a chief cause of the delay is reliance on proper and preferred process, then employers would obtain protection for persistence in unlawful action, and reliance on the Act would itself be found a buttress of economic discrimination.

Such rules cannot be abided. Accordingly, though it may seem bold to grant sixteen years' seniority where less than five were served, the court concludes that nothing less will do.

Therefore, as United and ALPA by their mutual opposition to Mrs. Sangster's employment as a stewardess caused her an injury for which they are liable, injury which includes, in addition to denial of that position, loss of seniority which otherwise would have accrued, the court holds that Mrs. Sangster is entitled by way of relief to reinstatement in the position of stewardess with such seniority as would have been hers on November 8, 1968, had United's discriminatory policy never been in effect, plus full seniority credit for the period since that date to the present. It is so ordered.

No just reason for yet more delay appearing, partial summary judgment with respect to fewer than all the issues shall be entered for Mrs.

Sangster. Fed. R. Civ. P. 54(b). Judgment will be entered on the issues of liability and reinstatement with seniority in accordance with the order herein made, leaving for later resolution the issues of monetary damages, interest, and attorney fees.

Further, the court considers that this matter has been pending for an altogether inordinate length of time and, therefore, will entertain no application for stay of this order and judgment, but rather orders that Mrs. Sangster be reinstated with seniority forthwith. See Coffin v. Secretary of Health, Education and Welfare, 400 F.

Supp. 953, 959 (D.D.C. 1975) (appeal pending).

Dated: October 14, 1977.

/s/ Samuel Conti
United States District Judge

FOOTNOTES

1/ Due to an administrative oversight, Mrs. Sangster continued to be carried on United's stewardess seniority list until February 20, 1969, when her name was removed because of her marriage.

2/ Ultimately, ALPA and United reached agreement on contract changes which would have permitted Mrs. Sangster's return to stewardess status. At the time she left United, however, Mrs. Sangster was not privy to the discussions then in prospect, and knew only, as she was informed by United's President Keck, that ALPA had twice refused United's proposal of an extension, that it was unwilling to discuss alteration of the policy further, but that further negotiations would begin July 15, 1969. ALPA and United were unable to agree on the terms of that extension until October 16, 1969, despite protestations now that both were fully in favor of it. As best Mrs. Sangster could discern when she decided to quit her supervisory job, prospects for change either through internal grievance machinery or by way of collective bargaining were dim.

3/ See, e.g., United Airlines, Inc. v. McDonald, 53 L. Ed 2d 423 (U.S., June 20, 1977); United Air Lines Inc. v. Evans, 52 L. Ed 2d 571 (U.S., May 31, 1977); Collins v.

United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971); Lansdale v. United Air Lines, Inc., 437 F.2d 454 (5th Cir. 1971); Inda v. United Air Lines, 405 F.Supp. 426 (N.D. Cal. 1975); Kennedy v. Braniff, 403 F. Supp, 707 (N.D. Tex. 1975); Gerstle v. Continental Airlines, Inc., 5 E.P.D. (CCH) § 8,647 (D.Colo. 1973); Romasanta v. United Air Lines, Inc., 6 E.P.D. (CCH) § 8,806 (N.D. Ill. 1972).

4/ Occidental Life Ins. Co. of California v. EEOC, 53 L. Ed 2d 402, 407 (1977).

5/ Nor did the United-ALPA agreement of October 16, 1969, which would have permitted Mrs. Sangster's transfer with full seniority had she then been with United as a stewardess supervisor, bring a full end to this discriminatory policy, but only further narrowed its impact, as by its terms the agreement applied only to former stewardesses then "currently in a stewardess management . . . position." Thus, the policy continued to bar married stewardess supervisors who had left that position or otherwise failed to maintain continuous seniority, notwithstanding prior application for active stewardess service and continous maintenance of efforts to obtain redress.

6/ Both United and ALPA continue to oppose Mrs. Sangster's reinstatement as a stewardess on the same terms as would have applied to other similarly situated stewardess supervisors. United is willing to reinstate Mrs. Sangster, and did so for one day on May 1, 1977, but is unwilling to pay any back wages. ALPA at one stage seemed willing to accept Mrs. Sangster's reinstatement, but it strenuously opposes reinstatement with full seniority.

[Filed October 14, 1977]
WILLIAM L. WHITTAKER, CLERK

No. C-76-2426

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LINDA E. SANGSTER, an individual,	)
Plaintiff,	)
v.	)
UNITED AIR LINES, INC., a Delaware corporation, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, a labor organization,	)
Defendants.	)

JUDGMENT

It is hereby ordered, adjudged and decreed that plaintiff's motion for partial summary judgment on the issues of liability and reinstatement with full seniority is granted, and plaintiff shall be reinstated in the position of

stewardess with such seniority as would have been hers on November 8, 1968, plus full seniority credit for the period since that date to the present.

No just reason for yet more delay appearing, partial summary judgment with respect to fewer than all the issues shall be entered for Mrs. Sangster. Fed. R. Civ. P. 54(b). Judgment will be entered on the issues of liability and reinstatement with seniority in accordance with the order herein made, leaving for later resolution the issues of monetary damages, interest, and attorney fees.

Defendant Air Lines Pilots Association's motion for summary judgment, or in the alternative to dismiss

the complaint for lack of jurisdiction or failure to state a claim, is denied.

Dated: October 14, 1977

/s/ Samuel Conti
United States District Judge

Entered in Civil Docket
October 17, 1977

APPENDIX C
C 76-2426 SC

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: HONORABLE SAMUEL CONTI, JUDGE

LINDA E. SANGSTER, an individual,

Plaintiff,

v.

UNITED AIR LINES, INC., a Delaware Corporation, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, a labor organization,

Defendants.

REPORTER'S TRANSCRIPT
(Partial)

November 7, 1977

Reported by: Betti A. Murray,
C.S.R., R.P.R., C.P., C.M.
Official Reporter
U.S. District Court
San Francisco, California 94102

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STEPHEN B. MOLDOF, ESQ.

MONDAY, NOVEMBER 7, 1977

THE COURT: All right. On the facts of this case, the second phase of the case, with reference to the back pay, duty to mitigate, inflation factor and attorneys' fees and amount, came on regularly for hearing on this date. The facts remain the same; that on November 8th, 1968, the plaintiff was denied transfer to a stewardess position; and on July 16, 1969, she quit her position with United as a stewardess supervisor, a position which paid more than the stewardess position she sought.

The Court has held that her quitting the supervisory post may not overcome the unlawfulness of the United's and ALPA's refusal to hire, although it may have some relevance to the issues of damages.

There is a strong policy favoring awards of back pay and the finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer; Albemarle Paper Company versus Moody, 422 US 405.

And the burden is on the defendants to prove unreasonable failure to mitigate. Once the gross amount of back pay owing is calculated, the burden shifts to the defendant to prove what should be deducted therefrom as interim earnings or amounts capable with reasonable diligence. Defendants' burden of proving lack of diligence is not satisfied merely by showing that there was -- that there were further actions which plaintiff could have taken in pursuit of the employment. Rather, the defendant

must show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment.

The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct.

In addition, the defendant must show that the plaintiff, had she been diligent, she might have found employment and had some earnings.

And in seeking her work, plantiff need not look outside her own geographic area and for a time, need not accept work unrelated with her skills and interests. And it is Hornbook law that the rule is well settled that a discharged plaintiff is not bound to seek or accept other employment in a

different locality in order to mitigate the damages.

Having that in mind and having the burden of proof that the plaintiff and the defendant -- having the burden of proof that the defendant must sustain, the Court is impressed with the following evidence:

The plaintiff has testified that, with reference to the mitigation of damages in this case, which is the central and crucial issue, the plaintiff has testified that she reviewed classified ads for suitable jobs. However, there is no evidence that she made any calls with reference to her perusal of the classified ad section and we are talking of a period of almost eight years from July 1969 to May, 1977. Also that she applied as a cocktail waitress

or restaurant hostess; the great majority of those, about four applications, made after she consulted her lawyer in December of 1975, and only two before that time.

She inquired by telephone only of four travel agencies regarding employment. She did not apply to other airlines and she did not register at any employment agency for work or with the State nor did she apply for benefits, all of this during the said eight year period.

The plaintiff has no children; she's had ample time to seek other employment in mitigation and the Court finds that she wanted the position of flight attendant and that's all, and she did nothing in mitigation of damages for the eight year period. This plaintiff

does not come anywhere near the minimum standards and her conduct was so deficient as to constitute an unreasonable failure to seek employment. She has an interest in one position only, and that was the interest that she had in being a stewardess, and with only one airline. And 'though the stewardess' position is highly unique and 'though the position of stewardess with zero seniority is a different one than with high seniority, her right to restrict her work search to her own profession and geographical area is not indefinite and there comes a time when she must seek it and here her efforts were unreasonable.

Here we have a woman who is an intelligent, attractive, competent and capable young woman who was a flight attendant, a highly competent person who

should not have had any trouble gaining employment if she had wanted it, but she only wanted to be a flight attendant and that's all, and her activities indicate she had no interest in any other position and the Court is impressed with the facts and finds, as a fact, that the plaintiff really was not interested in any other position during this time. She was not interested in seeking any employment that would in any way mitigate the damages that she alleged that she sustained.

There is a standard, even though the burden of proof is upon the defendant in cases such as this to show the unreasonable failure to mitigate, there still remains a standard of conduct on the part of the plaintiff which must be borne out by the plaintiff and

that standard of conduct in this case was -- that was followed, was so deficient as to constitute an unreasonable failure to seek employment.

We are talking about an eight year period and the amount of contacts with the employment were -- all during this period -- deminimus (phonetic).

The Court then finds that the plaintiff did not mitigate her damages, has not sought to mitigate her damages, and, therefore, is not entitled to any recovery for back pay.

In a Federal tort claims case, the Ninth Circuit has held a little different standard with reference to attorneys' fees. The plaintiff, in a case of this type, is entitled to attorneys' fees except in very unusual

circumstances. And this issue is distinct from her entitlement to back pay.

The Supreme Court said, in the Albemarle case, that while Title VII appears to leave attorney fee awards in the District Court's discretion, the great public interest in having injunctive actions brought would be vindicated only if successful plaintiffs act as private attorney generals with awarded attorneys' fees in all but unusual circumstances.

The Ninth Circuit has held that the amount of the award should not be such as would discourage others from attacking discriminatory practices, but that it should be also a proportionate amount to which extent the plaintiff prevails. That's Schaffer (phonetic) versus San Diego Cabs, 462 Fed. 2d. 102,

and within that framework, the Court's discretion is guided by the usual factors applying to awards of attorneys' fees.

In this case, the plaintiff's attorneys were successful in gaining the relief sought with reference to her back seniority. They were successful in that regard. They were unsuccessful in the receiving of back pay and the Court, taking that into consideration together with, with reviewing the time schedule here, awards attorney fees in the sum of $5,537 plus costs.

Now, the Court, directing its attention now to the attorney for the defendants, I had told you at one time that the question of apportionment of attorneys' fees would be determined by the Court at a later date. Do you

desire, at this time, the Court to make an allocation of the award of attorneys' fees, or do you want to take that up between yourselves?

MR. CONNORS: I think we might try to take care of it between ourselves, unless Mr. Moldorf disagrees.

MR. MOLDOF: I'm agreeble with that, Your Honor.

THE COURT: Just make the judgment against the defendants in the sum of $5,537; is that agreeable?

MR. CONNORS: Yes, we can fight it out some other place.

THE COURT: Some other place than here, huh?

MR. CONNORS: Yes.

THE COURT: All right. Those are the findings of fact and conclusions of law of the Court and, counsel, will

you prepare judgment in that regard and hand it in within the next few days?

Thank you, gentlemen.

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE, SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, PAGES 1 THROUGH 8, INCLUSIVE, CONSTITUTE A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

SIGNED /s/ Betti A. Murray

Dated: March 6, 1981

Respectfully submitted,

Robert W. Tollen
CHICKERING & GREGORY